

EXHIBIT M

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8
 9 UNITED STATES DISTRICT COURT
 10 FOR THE EASTERN DISTRICT OF CALIFORNIA
 11 SACRAMENTO DIVISION

12 SAN DIEGO GAS & ELECTRIC COMPANY,) CASE NO.
 a California corporation,)

13 Plaintiff,)

14 vs.)

15 ARIZONA ELECTRIC POWER)
 COOPERATIVE, INC.; CITY OF ANAHEIM,) **COMPLAINT FOR BREACH OF**
 16 CALIFORNIA; CITY OF AZUSA,) **CONTRACT, ANTICIPATORY**
 CALIFORNIA; CITY OF BANNING,) **BREACH OF CONTRACT,**
 17 CALIFORNIA; CITY OF BURBANK,) **UNJUST ENRICHMENT,**
 CALIFORNIA; CITY OF GLENDALE,) **MONEY HAD AND RECEIVED**
 18 CALIFORNIA; CITY OF LOS ANGELES,) **AND DECLARATORY RELIEF;**
 CALIFORNIA; LOS ANGELES) **DEMAND FOR JURY TRIAL**

19 DEPARTMENT OF WATER AND POWER;)
 20 CITY OF PASADENA, CALIFORNIA; CITY)
 OF RIVERSIDE, CALIFORNIA; CITY OF)
 21 SANTA CLARA, CALIFORNIA; CITY OF)
 SEATTLE, WASHINGTON; CITY OF)
 22 VERNON, CALIFORNIA; EUGENE WATER)
 AND ELECTRIC BOARD; MODESTO)
 23 IRRIGATION DISTRICT; NORTHERN)
 CALIFORNIA POWER AGENCY; PUBLIC)
 24 UTILITY NO. 2 OF GRANT COUNTY;)
 SACRAMENTO MUNICIPAL UTILITY)
 25 DISTRICT; SALT RIVER PROJECT)
 AGRICULTURAL IMPROVEMENT AND)
 26 POWER DISTRICT; TURLOCK)
 IRRIGATION DISTRICT,)

27 Defendants.)
 28)

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial of all issues properly triable to a jury.

DATED: March 21, 2006

HENNIGAN BENNETT & DORMAN LLP
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Laura Lindgren
Robert W. Mockler

By /s/ Laura Lindgren
Laura Lindgren

Attorneys for Plaintiff
San Diego Gas & Electric Company

HENNIGAN, BENNETT & DORMAN LLP
LAWYERS
LOS ANGELES, CALIFORNIA

COMPLAINT

Plaintiff San Diego Gas & Electric Company files this Complaint and alleges as follows:

I. JURISDICTION AND VENUE

1. Jurisdiction is proper because the claims arise under federal law. 28 U.S.C. § 1331. This action concerns Defendants' violations of obligations under the California Independent System Operator ("Cal ISO") and the California Power Exchange Company ("CalPX") Tariffs, filed with and regulated by the Federal Energy Regulatory Commission ("FERC") under authority of the Federal Power Act. The Tariffs are the equivalent of federal regulations, and claims for their violation present a federal question. The claims require resolution of a contested and substantial issue of federal law as the claims arise out of sales of electric energy in wholesale electric markets that are within the exclusive regulatory jurisdiction of FERC, and Plaintiff seeks recovery for Defendants' breaches of contractual obligations contained in Tariffs filed with and regulated by FERC. The Court has supplemental jurisdiction over any state law claims under 28 U.S.C. § 1367 because any such state law claim forms part of the same case or controversy as the federal claims.

2. Venue is proper in this Court because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district, in the County of Sacramento, California. Further, Defendants are subject to personal jurisdiction and are therefore deemed to reside in this district. 28 U.S.C. § 1391.

3. Jurisdiction and venue are also proper because all parties agreed to be and are bound by the terms of the Cal ISO Tariff and CalPX Tariff. The Cal ISO Tariff includes a provision stating that actions arising out of or relating to the Tariff:

shall be brought in any court of the State of California

or any federal court of the United States of America

located in the State of California. Market Participants

1 irrevocably waive any objection that they may have
2 now or in the future to said courts in the State of
3 California as the proper and exclusive forum for any
4 legal action or proceeding arising under or related to
5 this ISO Tariff.

6 Cal ISO Tariff, § 20.7.¹ The CalPX Tariff similarly provides that any legal action or
7 proceeding arising under or relating to the Tariff “shall be brought either in a court of
8 the State of California [or] a federal court of the United States of America located in
9 the State of California.” CalPX Tariff § 19.6.

10 4. Personal jurisdiction is proper because each of the Defendants made
11 sales of electric power in this district, because this action arises out of Defendants’
12 sales of electric power within this district and because Defendants consented to the
13 jurisdiction of this Court as stated above.

14 **II. PARTIES**

15 5. Plaintiff San Diego Gas & Electric Company (“SDG&E”), a California
16 corporation, is a regulated public utility under California and federal law, which
17 provides natural gas and electric service to customers in San Diego and southern
18 Orange Counties. SDG&E’s principal place of business is San Diego, California.

19 6. Defendant Arizona Electric Power Cooperative, Inc. (“AEPCO”) is a
20 rural electric generation and transmission cooperative incorporated in Arizona with its
21 principal place of business in Benson, Arizona. AEPCO is registered to do business
22 in California.

23 7. Defendant City of Anaheim, California is a California city.

24 8. Defendant City of Azusa, California is a California city.

25 9. Defendant City of Banning, California is a California city.

26
27 ¹ The complete current version of the Tariff is a publicly filed document available at
28 <http://www.caiso.com/1791/1791a8ff1c7d0.html>, and is incorporated herein by
reference.

10. Defendant City of Burbank, California is a California city.

11. Defendant City of Glendale, California is a California city.

12. Defendant City of Los Angeles, California is a California city.

13. Defendant Los Angeles Department of Water and Power is a municipal utility and a proprietary department of Defendant City of Los Angeles.

14. Defendant City of Pasadena, California is a California city.

15. Defendant City of Riverside, California is a California city.

16. Defendant City of Santa Clara, California is a California city.

17. Defendant City of Seattle, Washington is a city in the State of Washington.

18. Defendant City of Vernon, California is a California city.

19. Defendant Eugene Water and Electric Board is a municipal utility located in Eugene, Oregon.

20. Defendant Modesto Irrigation District is a California irrigation district located in Modesto, California.

21. Defendant Northern California Power Agency is a California agency located in Roseville, California.

22. Defendant Public Utility No. 2 of Grant County ("Grant County PUD") is a municipal electric utility located in Ephrate, Washington.

23. Defendant Sacramento Municipal Utility District is a municipal electric utility located in Sacramento, California.

24. Defendant Salt River Project Agricultural Improvement and Power District ("Salt River Project") is an agricultural improvement district located in the State of Arizona.

25. Defendant Turlock Irrigation District is a California irrigation district located in Turlock, California.

III. SUMMARY OF CASE

26. This case results from Defendants' refusal to return overcharges to

1 SDG&E for sales of electric energy from May 1, 2000 through June 20, 2001, in
2 wholesale markets operated by Cal ISO and CalPX and regulated by FERC. FERC,
3 which has jurisdiction over rates for wholesale power sales, has determined that the
4 markets operated by the Cal ISO and CalPX during this period were dysfunctional
5 and flawed, resulting in rates that were unjust, unreasonable and unlawful by all
6 sellers. Pursuant to its authority under the Federal Power Act, FERC ordered the rates
7 for sales from October 2, 2000 through June 20, 2001 adjusted and reduced. As a
8 result of FERC's modification of the rates under the Tariffs for all sellers into the Cal
9 ISO and CalPX markets, Defendants, who agreed to be bound by the Tariffs, are now
10 contractually obligated to reimburse SDG&E for the difference between the rates
11 Defendants charged and the lawful, corrected rates established by FERC.

12 27. SDG&E is also entitled to a declaration that Defendants are obligated to
13 pay to SDG&E the difference between rates charged by Defendants and the lawful
14 rates as ultimately determined by FERC (i) for sales during the period from May 1,
15 2000 through October 1, 2000; and (ii) for certain non-spot sales during the period
16 from October 2, 2000 through June 20, 2001.

17 28. Following its determination of the lawful rates for spot market sales from
18 October 2, 2000 through June 20, 2001, FERC ordered sellers of electricity, including
19 both public utilities and non-public utilities (i.e., governmental entities), to refund the
20 amounts charged in excess of the just and reasonable rates. Defendants, however,
21 objected to FERC's refund order, claiming that FERC does not have jurisdiction to
22 require governmental entities to pay refunds. The Ninth Circuit, while affirming
23 FERC's jurisdiction to set and adjust the rates under the Cal ISO and CalPX Tariffs,
24 agreed that FERC lacked jurisdiction to order governmental utilities such as
25 Defendants to refund overcharges. The Ninth Circuit noted that SDG&E and other
26 parties may pursue contractual claims based on FERC's orders and adjusted prices.

27 29. SDG&E thereafter submitted claims to each Defendant seeking recovery
28 of amounts paid in excess of the adjusted rates established or to be established by

1 FERC. Each Defendant subsequently rejected (or, under applicable law, is deemed to
2 have rejected) those claims, and this action followed to enforce Defendants'
3 obligations to return the overcharges.

4 **IV. FACTUAL BACKGROUND**

5 **A. Cal ISO and CalPX**

6 30. In 1996, California enacted Assembly Bill 1890 ("AB 1890") to
7 deregulate and restructure its electricity markets. As part of deregulation, California
8 created two non-profit public benefit corporations to manage the electricity market,
9 the Cal ISO and the CalPX. Both are public utilities subject to the exclusive
10 regulatory jurisdiction of FERC under the Federal Power Act. All sales of power and
11 ancillary services² in the Cal ISO and CalPX markets were required to be made
12 pursuant to Tariffs filed with and approved by FERC, which prescribed the terms,
13 conditions and formulas to establish rates for all transactions in those markets.
14 Plaintiff, and the other investor owned utilities subject to AB 1890, were required to
15 meet all of their customers' needs by making purchases in the Cal ISO and CalPX
16 markets.

17 31. The Cal ISO and CalPX Tariffs are the equivalent of federal regulations,
18 and also establish contractual obligations among the market participants, prescribing
19 the rules, requirements and pricing formulas for all transactions in the Cal ISO and
20 CalPX markets. FERC has the authority to determine and set rates under those
21 Tariffs.

22 32. Under the terms of the Cal ISO and CalPX Tariffs, the real-time markets
23 for electric energy sales were operated by Cal ISO and CalPX generally on the basis
24 of a "single-price auction" in which, for each hour, all buyers pay, and all sellers are
25 paid, the same price, the "market clearing price." The market clearing price is set as
26 _____

27 ² Ancillary services are services such as reserve generating capacity that are necessary
28 to maintain the reliability of the transmission of electricity from generators to
customers.

1 the bid by the highest-bidding seller whose electric energy was needed to “clear the
2 market” or balance supply and demand. In other words, the Cal ISO or CalPX stacks
3 the bids to sell from lowest to highest and accepts bids from lowest to highest until the
4 demand is met; the price of the last bid accepted is set as the market clearing price.
5 As a result, all of the successful bidders to sell in a particular hour in the spot market,
6 including Defendants, received the same price for their sales, even if a seller had
7 offered to sell at a lower price.³ Thus, any flaws or dysfunctions that inflated the
8 market-clearing price affected the price received by each and every seller in the
9 market, including Defendants.

10 33. Cal ISO and CalPX acted as clearinghouses for sales of electric energy.
11 Each month during the relevant time period, Cal ISO and CalPX calculated the total
12 amount of electric power supplied and purchased by each market participant,
13 including Defendants. Cal ISO and CalPX then issued invoices indicating the amount
14 due to or from each market participant based on the market clearing price for each
15 hour.

16 34. Under their respective Tariffs, the Cal ISO and CalPX pass through
17 liability for market shortfalls to market participants, including SDG&E, that bought or
18 sold power in the markets during the period for which there is a shortfall of funds. A
19 market shortfall may result if one market participant defaults on a payment, causing a
20 shortage of total funds collected by either the Cal ISO or CalPX for distribution to the
21 other market participants. An entity that fails to pay its bill becomes responsible for a
22 market shortfall, and is deemed an “ISO Debtor” or a “PX Debtor.” An entity that is
23 owed money because of the market shortfall is deemed an “ISO Creditor” or “PX
24 Creditor,” with the right to enforce its contractual right to payment against an ISO or
25

26
27 ³ By FERC order, CalPX auctions discontinued on January 31, 2001. *See* CalPX’s
28 Notice of Suspension of Trading, FERC Docket No. EL00-95-000, January 30, 2001.
Cal ISO continues to manage the grid and operate auctions for real time electric
energy.

1 PX Debtor.

2 35. The Cal ISO and the CalPX operated as revenue-neutral clearinghouses,
3 and were not themselves counterparties to any market transactions. SDG&E, as a
4 market purchaser, is a counterparty to sales by Defendants in the Cal ISO and CalPX
5 markets and has standing to enforce Defendants' contractual obligations under the Cal
6 ISO and CalPX Tariffs and related agreements.

7 36. The Cal ISO and CalPX Tariffs provided the only terms and conditions
8 on which transactions in the Cal ISO and CalPX markets could lawfully be conducted.
9 The Tariffs required each participant in the Cal ISO and CalPX markets to comply
10 with all rules, conditions and provisions of the Cal ISO and CalPX Tariffs. By selling
11 in those markets, all market participants, including Defendants, were charged with
12 knowledge and bound by the terms of the Cal ISO and CalPX Tariffs. Further, in
13 order to sell electricity through the Cal ISO, generators were required to agree in
14 writing "to comply with all applicable provisions of this ISO Tariff as they may be
15 amended from time to time." Cal ISO Tariff, § 5.⁴

16 37. The Cal ISO Tariff contemplates that market participants would execute
17 a Participating Generator Agreement and/or a Scheduling Coordinator Agreement
18 with the Cal ISO. Pursuant to the Participating Generator Agreements, a party agreed
19 in writing "that it will comply with the applicable provisions of the ISO Tariff" and
20 "fully comply with all of its obligations under . . . the ISO Tariff." The Participating
21 Generator Agreement further provides that it "shall be subject to the ISO Tariff which
22 shall be deemed to be incorporated herein." Similarly, parties to the Scheduling
23 Coordinator Agreement agreed to be bound by the Cal ISO Tariff, which was
24 incorporated into the Agreement. Scheduling Coordinator Agreement, §§ 2, 8.

25 38. The CalPX Tariff contemplates that market participants would execute a
26

27 ⁴ By the terms of the Cal ISO Tariff, any amendment to the Tariff "shall be effective
28 upon the date it is permitted to become effective by FERC." Cal ISO Tariff, § 19.

1 Participation Agreement with CalPX, under which participants agreed that:

- 2 • “[T]he PX Tariff governs all aspects of trading in and administration of
- 3 the PX Market”;
- 4 • They would “abide by, and will perform all of the obligations under the
- 5 “PX Tariff”; and
- 6 • Their “status as a PX Participant is at all times subject to the PX Tariff.”

7 Form of Participation Agreement to the PX Tariff, § II.

8 39. Thus, by electing to sell power in the Cal ISO and CalPX markets, and/or
9 by executing the agreements required by the Tariffs, Defendants agreed to be bound
10 by the provisions of the Cal ISO and CalPX Tariffs and FERC’s regulation and
11 modification thereof, including FERC’s orders adjusting the rates sellers could
12 lawfully charge for sales in those markets. These obligations may be enforced by
13 market participants against one another. SDG&E is a direct party to and an expressly
14 intended beneficiary of these contractual obligations and is entitled to seek relief from
15 Defendants.

16 40. If the price charged by sellers was found by FERC to be unjust and
17 unreasonable or otherwise unlawful, all market sellers were contractually bound to
18 refund or credit to purchasers the difference between the price charged and the lawful,
19 corrected rate determined by FERC. Thus, all market participants were contractually
20 bound to honor the terms and conditions of the Tariffs, as revised by FERC, and these
21 terms and conditions can be contractually enforced by the market participants against
22 one another. Defendants’ obligation to refund or credit their unlawful overcharges is
23 the same obligation owed by all sellers in the Cal ISO and CalPX markets, although
24 SDG&E’s obligations for their sales of electric power and other services in the Cal
25 ISO and CalPX markets remain under FERC’s exclusive jurisdiction.

26 **B. FERC’s Adjustment of Allowable Rates**

27 41. In May 2000, prices for electricity in the Cal ISO and CalPX markets
28 rose dramatically. By summer of 2000, spot prices for electricity were several times

1 what they had been in 1999. From May to August 2000, the Cal ISO declared system
2 emergencies 39 times. The skyrocketing costs of electricity took a huge toll on
3 California businesses and individuals. The first ratepayer impacts were felt in San
4 Diego, because SDG&E rates in the summer of 2000 provided for immediate pass-
5 through of the increased wholesale power costs to ratepayers.

6 42. On August 2, 2000, SDG&E filed a complaint with FERC against all
7 sellers of energy and ancillary services in California into the Cal ISO and CalPX
8 markets. In response, FERC initiated proceedings to:

9 investigate whether the tariffs and institutional
10 structures and bylaws of the California ISO and PX are
11 adversely affecting the efficient operation of
12 competitive wholesale power markets in California.

13 August 23, 2000 Order, 92 FERC P61,172, at 61,603.⁵ All of the Defendants here had
14 notice of and an opportunity to participate in the FERC proceedings. Indeed, each of
15 the Defendants was a party to or intervenor in the FERC proceedings. *See* December
16 19, 2001 Order, 97 FERC P61,275 at 62,257-60 (listing all parties to the proceedings).

17 43. FERC conducted an investigation and, in a series of orders, ruled that
18 sellers of electric energy in the Cal ISO and CalPX markets had sold power at unjust,
19 unreasonable and unlawful rates. FERC ordered changes to the Cal ISO and CalPX
20 Tariffs, and adjusted the rates for spot transactions for sales of electric energy during
21 the period from October 2, 2000 to June 20, 2001 for all market participants,
22 including Defendants.

23 44. By order of November 1, 2000, FERC, noting "the seriousness of market
24 dysfunctions and recent pricing abnormalities in California," proposed "specific
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27 ⁵ All of the orders in the SDG&E FERC proceedings are titled *San Diego Gas &*
28 *Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated*
by the California Independent System Operator and the California Power Exchange.
For convenience, this title has been omitted; the orders are referred to by date.

1 remedies to address dysfunctions in California's wholesale bulk power markets and to
2 ensure just and reasonable wholesale power rates by public utility sellers in
3 California." November 1, 2000 Order, 93 FERC P61,121, at 61,349. FERC found
4 that the California market structure and rates were seriously "flawed" and that the
5 rates for electricity in the California market were unjust and unreasonable. *Id.* at
6 61,370. FERC explained that the structure of the single-price auction managed by Cal
7 ISO and CalPX contributed to high prices:

8 In times of adequate supply the single price auction
9 disciplines prices by encouraging suppliers to bid their
10 marginal costs so that they can be selected for dispatch
11 and be paid the clearing price. However, in times of
12 scarcity the single price auction can exacerbate the
13 effect of supply shortages by allowing sellers who have
14 small market shares to set the clearing price. Not only
15 is the seller transformed into a price setter rather than a
16 price taker, but the resulting price is ascribed to the
17 entire market.

18 *Id.* at 61,365.

19 45. On July 25, 2001, FERC "establish[ed] the scope of and methodology for
20 calculating refunds to transactions in the spot markets operated by" Cal ISO and
21 CalPX. July 25, 2001 Order, 96 FERC P61,120, at 61,499. In place of the auction
22 prices, which had resulted in unlawful rates, FERC established corrected rates, known
23 as the Mitigated Market Clearing Price ("MMCP"). FERC ordered the rates under the
24 Cal ISO and CalPX Tariffs modified to reflect the MMCP for spot sales during the
25 period from October 2, 2000 through June 20, 2001 (the "Refund Period"), and
26 ordered Cal ISO and CalPX to recalculate charges for electric energy during that
27 period using the adjusted rates. Pursuant to FERC's orders, Cal ISO and CalPX have
28 recalculated the accounts of all sellers and buyers in the Cal ISO and CalPX markets

1 to reflect the corrected rates for the Refund Period.

2 46. In order to maintain the reliability of the State's electric grid, the ISO
3 was sometimes required to obtain emergency electric power, known as "out-of-
4 market" or "OOM" electric power, to meet the State's demand for electric power.
5 The Cal ISO procured OOM electric power at whatever price it was offered, even if
6 that price exceeded its price caps, and then charged market participants, including
7 Plaintiff for these products and services. OOM purchase prices are included in the
8 mitigated prices calculated by FERC for the Refund Period.

9 47. Although FERC found that the markets had been flawed and
10 dysfunctional prior to October 2, 2000, it ruled that it did not have jurisdiction to
11 order refunds for periods prior to that date, from May 1 through October 1, 2000 (the
12 "Summer Period"). *Id.* at 61,499.

13 48. FERC also refused to correct the rates for certain non-spot sales, *i.e.*
14 "energy exchange" transactions (in which blocks of electric power were sold to the
15 ISO for payment in-kind) and sales to Cal ISO or CalPX of greater than twenty-four
16 hours ("multi-day" sales under FERC's definition) made during the Refund Period.
17 *Id.*; March 26, 2003 Order, 102 FERC P61,317 at 62,083-84, 62,075-76; October 16,
18 2003 Order, 105 FERC P61,066, at 61,365-66. SDG&E has appealed FERC's
19 decisions to limit refunds to the Refund Period and to exclude certain non-spot
20 transactions, and the appeal is currently pending before the Ninth Circuit.

21 49. FERC made clear that sales by all market participants would be subject
22 to the refund order, including "sales by public and non-public utilities into these
23 markets." July 25, 2001 Order, 96 FERC P61,120, at 61,499. FERC explained that
24 both "[n]on-public utility sellers [i.e., governmental entities] as well as public utility
25 sellers of electric energy in those California markets contributed to and benefited from
26 the dysfunctions that offered the possibilities for the market abuse under certain
27 conditions." *Id.* at 61,511. FERC acknowledged that "non-public utility sellers . . .
28 are not subject to our direct jurisdiction under FPA section 206." *Id.* at 61,511-12.

1 But FERC concluded that refund liability was nevertheless appropriate:

2 Under the specific circumstances presented, . . . such
3 jurisdiction may properly be asserted over non-public
4 utility sellers of energy. Under the single price auction
5 mechanism that operated in the centralized ISO and
6 [CalPX] spot markets, all sellers agreed to accept the
7 same clearing price for any given sale. . . . All sellers
8 into those markets were on notice that those clearing
9 prices, and the market rules that set the clearing prices,
10 were subject to change if they were found to be unjust
11 and unreasonable.

12 *Id.* at 61,512; *see also* December 19, 2001 Order, 97 FERC P61,275 (ruling on
13 petitions for rehearing filed by several parties).

14 50. Several of the Defendants, which acted as buyers as well as sellers of
15 power in the Cal ISO and CalPX markets during the relevant time periods have
16 claimed refunds pursuant to FERC's rulings.

17 51. The Defendants are contractually and legally obligated to charge no more
18 than the rates established by FERC under the Cal ISO and CalPX Tariffs. Because
19 FERC's orders corrected the Tariff terms controlling pricing, for the Refund Period,
20 Defendants were obligated to charge only those rates established by FERC, and must
21 return to Plaintiff any amounts charged in excess of the corrected lawful rates
22 established by FERC.

23 52. Further, the rates charged by Defendants for the Summer Period, from
24 May 1 through October 1, 2000, and the rates charged in certain non-spot sales during
25 the Refund Period, *i.e.* "energy exchange" and "multi-day" transactions, were
26 comparable to and the result of the same flaws and dysfunctions as the rates that
27 prevailed in the Cal ISO and CalPX markets that were the subject of FERC's refund
28 order. If FERC grants relief for Summer Period sales and/or for energy exchange and

1 multi-day transactions, Plaintiff will be entitled to recover from Defendants the
2 difference between the rates charged by Defendants and the lawful rates as ultimately
3 determined by FERC for such transactions.

4 **C. The Ninth Circuit Proceedings**

5 53. Defendants appealed FERC's orders to the Ninth Circuit, arguing that
6 FERC did not have jurisdiction to order governmental entities to pay refunds. On
7 September 6, 2005, the Ninth Circuit issued an opinion ruling that, although FERC
8 had jurisdiction to establish the appropriate rates for sales into the Cal ISO and CalPX
9 markets, FERC did not have jurisdiction to order "non-public" utilities to pay refunds.
10 *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (2005).⁶ The Court explained that
11 FERC had done "more than simply reset the market-clearing price for power in the
12 FERC-jurisdictional ISO and CalPX markets." *Id.* at 919. Rather, FERC ordered
13 non-public utilities to pay refunds, which, the Ninth Circuit ruled, it did not have the
14 power to do under the Federal Power Act. The Court explained, "the remedy, if any,
15 may rest in a contract claim, not a refund action. Such an approach is not novel"
16 *Id.* at 925 (citing *Alliant Energy v. Neb. Pub. Power Dist.*, 347 F.3d 1046, at 1050-51
17 (8th Cir. 2003)). The Ninth Circuit quoted with approval the Eighth Circuit's holding
18 in *Alliant Energy* that "when a contract provides that its terms are subject to a
19 regulatory body, all parties to that contract are bound by the actions of the regulatory
20 body As a result, we are not enforcing the FERC order; instead, we are
21 enforcing an agreement, which [the non-public utility] freely entered." *Id.* at 926
22 (quoting *Alliant Energy*, 347 F.3d at 1050).

23 54. On October 17, 2005, the Ninth Circuit granted the motion by SDG&E
24 and others to extend the time to seek rehearing and/or rehearing en banc of the Ninth
25 Circuit's opinion, and to delay issuance of the mandate. Under the order, the parties
26

27
28 ⁶ All of the Defendants, as governmental entities, are considered "non-public utilities"
under the Federal Power Act. *See Bonneville*, 422 F.3d at 910; 16 U.S.C. § 824(f).

1 will have until 45 days after a ruling in *Public Utils. Comm'n of Cal. v. FERC*, Case
2 No. 01-71051, et al., to seek rehearing. Thus, the mandate has not yet issued in the
3 *Bonneville* case, and the Ninth Circuit's opinion is not yet final.

4 55. SDG&E and others have petitioned the Ninth Circuit for review of FERC
5 orders on the ground that, inter alia, FERC was required to correct the rates for sales
6 made during the Summer Period. That petition for review has been briefed and
7 argued and is now pending for decision in the Ninth Circuit. SDG&E and others have
8 also sought review of FERC's orders on the ground that FERC was required to correct
9 the rates for energy exchange transactions and multi-day sales. These petitions are
10 pending in the Ninth Circuit in Case No. 01-71051.

11 **D. Presentment of Claims**

12 56. On December 2, 2005, SDG&E complied with state claims presentment
13 statutes by serving copies of written claims on all California defendants and on the
14 Salt River Project, providing them with notice of SDG&E's present claims for relief.
15 Cal. Gov't Code § 910; Ariz. Rev. Stat. 12-821.01. On the same date, the SDG&E
16 also served claims on Eugene Water & Electric Board, the City of Seattle, and Grant
17 County PUD, in light of ambiguity as to whether the California Parties were required
18 to present these claims under Oregon and Washington law. Ore. Rev. Stat. § 30.275;
19 Rev. Code. Wash. 4.96.010-020. The Arizona claims presentment statutes do not
20 apply to RUS-financed cooperatives; consequently, no notice of claim was presented
21 to AEPCO.

22 57. The waiting periods prescribed by the applicable claims presentment
23 statutes have elapsed. The Cities of Anaheim, Azusa, Banning, Burbank, Glendale,
24 Pasadena, Riverside, Santa Clara, Los Angeles, Seattle and Vernon, and Los Angeles
25 Department of Water and Power, Modesto Irrigation District, Turlock Irrigation
26 District, Northern California Power Agency, and Sacramento Municipal Utility
27 District have denied SDG&E's claims. SDG&E's claims presented to Grant County
28 PUD and Salt River Project are deemed denied by operation of law because the

1 statutory period for a decision by these entities has expired. SDG&E's claims against
2 Eugene Water & Electric Board remain unsatisfied, and Oregon law does not require
3 any formal action by Eugene Water & Electric Board prior to filing suit.

4 58. FERC was the exclusive forum for SDG&E's refund claims, including
5 claims for refunds from Defendants. No claim accrued and no limitations period
6 commenced to run until, at the earliest, September 6, 2005, when the Ninth Circuit in
7 *Bonneville*, reversing FERC's holdings, ruled, for the first time, that FERC did not
8 have jurisdiction to order Defendants to pay refunds.

9 59. Alternatively, to the extent that any limitations period began to run
10 before the issuance of the *Bonneville* opinion, the limitations period was tolled from
11 August 2, 2000, when SDG&E initiated refund proceedings with FERC, through at
12 least the time the Ninth Circuit issued its decision in *Bonneville* on September 6,
13 2005.

14 60. This action is based on the same facts that were at issue in the FERC
15 proceedings and in the various Ninth Circuit appeals from those proceedings:
16 Defendants' receipt and retention of rates for sales of wholesale electric power in the
17 Cal ISO and CalPX markets that are unlawful and unauthorized under the Cal ISO
18 and CalPX Tariffs. SDG&E acted promptly, reasonably, and in good faith in seeking
19 relief from FERC against all sellers in the California markets, including Defendants.
20 Defendants were parties to the FERC proceedings, and had notice throughout the
21 FERC proceedings of the need to gather and preserve relevant evidence. In fact,
22 Defendants actively participated in the FERC proceedings. SDG&E acted
23 expeditiously to present claims to Defendants and to commence this action following
24 the *Bonneville* decision.

25 **V. CLAIMS FOR RELIEF**

26 **FIRST CLAIM FOR RELIEF**

27 **(For Breach of Contract Against All Defendants)**

28 61. Plaintiff incorporates by reference and re-alleges each and every

1 allegation of prior paragraphs as if fully set forth herein.

2 62. Plaintiff is a party to and intended beneficiary of the Cal ISO and CalPX
3 Tariffs. Defendants are parties to and agreed to abide by the Cal ISO and CalPX
4 Tariffs in connection with the sale of power on the wholesale market through Cal ISO
5 and CalPX by participating in the Cal ISO and CalPX markets, and by executing
6 written agreements stating that they would be so bound, including Participating
7 Generator Agreements, Scheduling Coordinator Agreements and Participation
8 Agreements, among others ("Agreements"). Defendants understood and agreed that
9 the Tariffs were subject to regulation by FERC, including FERC decisions to adjust
10 the terms of the Tariffs.

11 63. By voluntarily choosing to sell electric power at wholesale in the Cal
12 ISO and CalPX markets, and/or by executing the Agreements, PX Defendants
13 contractually agreed to be bound by the provisions of the Cal ISO and CalPX Tariffs,
14 which incorporate FERC's power to correct prices that it determines to be unjust,
15 unreasonable or unlawful.

16 64. Pursuant to its authority under the Federal Power Act, FERC revised the
17 Tariffs and corrected the prices that market participants were entitled to receive for
18 their sales during the Refund Period by adopting the MMCP. Upon FERC's
19 correction of the rates charged and received by sellers, including Defendants, in the
20 Cal ISO and CalPX markets, the corrected rates became the only lawful and
21 authorized rates for those sales under the applicable tariffs.

22 65. Plaintiff fulfilled all of its obligations under the Cal ISO and CalPX
23 Tariffs.

24 66. Defendants are contractually obligated to reimburse SDG&E for the
25 difference between the rates Defendants initially charged for their sales in the Cal ISO
26 and CalPX markets during the Refund Period and the MMCP determined by FERC.
27 Defendants breached their contractual obligations under the Tariffs by failing to
28 return to Plaintiff amounts paid by Plaintiff in excess of the rates set by FERC for the

1 Refund Period. As a result, Plaintiff incurred losses in an amount to be proven at
2 trial.

3 67. As stated above, Plaintiff has complied with the applicable government
4 claim presentation requirements.

5 68. Plaintiff has filed this Complaint within the applicable statute of
6 limitations or, in the alternative, that statute was tolled and/or equitably tolled during
7 the pendency of the FERC refund and related proceedings, including the pendency of
8 the *Bonneville* case, making this action timely.

9 **SECOND CLAIM FOR RELIEF**

10 **(For Anticipatory Breach)**

11 69. Plaintiff incorporates by reference and re-alleges each and every
12 allegation of prior paragraphs as if fully set forth herein.

13 70. If it is determined that the date by which Defendants would be obligated
14 under the applicable contracts to refund to Plaintiff the amounts they received in
15 excess of the lawful rates set by FERC for the Refund Period has not yet occurred,
16 Defendants have nonetheless become obligated to make such refunds immediately,
17 and in advance of such date, because they have wrongfully denied and repudiated any
18 legal duty to make such payments. Defendants have repudiated, in FERC
19 proceedings, in appeals from FERC orders, and by their denial of Defendants' duly-
20 presented claims, their contractual obligations to Plaintiff, including their obligation
21 to comply with the revised Tariff provisions by refunding their unlawful overcharges.

22 71. Defendants' conduct constitutes an anticipatory breach of their
23 contractual obligations to Plaintiff, entitling Plaintiff to judgment against each of the
24 Defendants for all amounts they received in excess of the lawful rates for sales during
25 the Refund Period, plus associated interest.

26 72. As stated above, Plaintiff has complied with the applicable government
27 claim presentation requirements.

28 73. Plaintiff has filed this Complaint within the applicable statute of

1 limitations or, in the alternative, that statute was tolled and/or equitably tolled during
2 the pendency of the FERC refund and related proceedings, including the pendency of
3 the *Bonneville* case, making this action timely.

4 **THIRD CLAIM FOR RELIEF**

5 **(For Unjust Enrichment Against All Defendants)**

6 74. Plaintiff incorporates by reference and re-alleges each and every
7 allegation of prior paragraphs as if fully set forth herein.

8 75. Defendants were enriched by receiving payment from Plaintiff in excess
9 of the lawful rates set by FERC under the Cal ISO and CalPX Tariffs for power sold
10 in the Cal ISO and CalPX markets. By accepting and retaining prices that are now
11 unlawful under the Cal ISO and CalPX Tariffs, and by denying their obligations to
12 refund or credit overcharges to buyers in the Cal ISO and CalPX markets, Defendants
13 have unjustly enriched themselves at the expense of market purchasers, including
14 SDG&E and ultimately, SDG&E's customers, who paid inflated and unlawful prices
15 for electric power. Defendants' retention of those unlawful prices also violates their
16 contractual duty to abide by the provisions of the Cal ISO and CalPx Tariffs.

17 76. Further, Defendants received these overcharges under circumstances that
18 make it unjust for Defendants to retain the benefits they received. For transactions in
19 which they were buyers, certain Defendants are seeking refunds from other sellers of
20 prices they paid in excess of the lawful, corrected rates. By contrast, for transactions
21 in which they were sellers, certain Defendants deny any obligation to pay refunds, and
22 seek to retain the windfall benefits of the original, unlawful prices they charged other
23 market participants.

24 77. Accordingly, Defendants have been unjustly enriched and are obligated
25 to return the overcharged amounts to Plaintiff.

26 78. As stated above, Plaintiff has complied with the applicable government
27 claim presentation requirements.

28 79. Plaintiff has filed this Complaint within the applicable statute of

1 limitations or, in the alternative, that statute was tolled and/or equitably tolled during
2 the pendency of the FERC refund and related proceedings, including the pendency of
3 the *Bonneville* case, making this action timely.

4 **FOURTH CLAIM FOR RELIEF**

5 **(Common Count For Money Had and Received Against All Defendants)**

6 80. Plaintiff incorporates by reference and re-alleges each and every
7 allegation of prior paragraphs as if fully set forth herein.

8 81. By accepting or retaining prices during the Refund Period that are
9 unlawful under the Cal ISO and CalPX Tariffs, Defendants have accepted benefits of
10 unlawful profits that rightfully belong to purchasers in the Cal ISO and CalPX
11 markets, including SDG&E. Any overcharges accepted or retained by Defendants
12 from SDG&E rightfully belong to and should be returned to SDG&E.

13 82. Accordingly, Defendants are obligated to return the overcharges in
14 excess of the lawful rates to Plaintiff.

15 83. As stated above, Plaintiff has complied with the applicable government
16 claim presentation requirements.

17 84. Plaintiff has filed this Complaint within the applicable statute of
18 limitations or, in the alternative, that statute was tolled and/or equitably tolled during
19 the pendency of the FERC refund and related proceedings, including the pendency of
20 the *Bonneville* case, making this action timely.

21 **FIFTH CLAIM FOR RELIEF**

22 **(For Declaratory Relief Concerning Sales During The Refund Period Against All** 23 **Defendants)**

24 85. Plaintiff incorporates by reference and re-alleges each and every
25 allegation of prior paragraphs as if fully set forth herein.

26 86. An actual controversy exists between Plaintiff and Defendants
27 concerning Defendants' obligation to pay to Plaintiff amounts paid by Plaintiff to
28 Defendants in excess of the rates set by FERC under the Cal ISO and CalPX Tariffs

1 for power purchased in the Cal ISO and CalPX markets from October 2, 2000 through
2 June 20, 2001. Defendants deny any such obligation.

3 87. Plaintiff seeks a declaration that Defendants are obligated to return to
4 Plaintiff amounts charged in excess of the rates set by FERC for the Refund Period.

5 88. As stated above, Plaintiff has complied with the applicable government
6 claim presentation requirements.

7 89. Plaintiff has filed this Complaint within the applicable statute of
8 limitations or, in the alternative, that statute was tolled and/or equitably tolled during
9 the pendency of the FERC refund and related proceedings, including the pendency of
10 the *Bonneville* case, making this action timely.

11 **SIXTH CLAIM FOR RELIEF**

12 **(For Declaratory Relief Concerning Sales During the Summer Period Against All**
13 **Defendants)**

14 90. Plaintiff incorporates by reference and re-alleges each and every
15 allegation of prior paragraphs as if fully set forth herein.

16 91. An actual controversy exists between Plaintiff and Defendants
17 concerning Defendants' obligation to pay to Plaintiff amounts paid by Plaintiff to
18 Defendants for power purchased in the Cal ISO and CalPX markets from May 1, 2000
19 through October 1, 2000. Defendants deny any such obligation.

20 92. The rates charged by Defendants during the Summer Period were
21 comparable to, and a result of, the same market flaws and dysfunction, as the rates
22 that prevailed in the Cal ISO and CalPX markets during the Refund Period.

23 93. Plaintiff seeks a declaration that, if FERC finds that the rates charged by
24 sellers during the Summer Period were unlawful, Defendants will be obligated to
25 return to Plaintiff the difference between the rates charged by Defendants and the
26 lawful rates as ultimately determined by FERC for sales of electric energy during the
27 Summer Period.

28 94. As stated above, Plaintiff has complied with the applicable government

1 claim presentation requirements.

2 95. Plaintiff has filed this Complaint within the applicable statute of
3 limitations or, in the alternative, that statute was tolled and/or equitably tolled during
4 the pendency of the FERC refund and related proceedings, including the pendency of
5 the *Bonneville* case, making this action timely.

6 **SEVENTH CLAIM FOR RELIEF**

7 **(For Declaratory Relief Concerning Energy Exchanges and Multi-Day Sales**
8 **Against All Defendants)**

9 96. Plaintiff incorporates by reference and re-alleges each and every
10 allegation of prior paragraphs as if fully set forth herein.

11 97. An actual controversy exists between Plaintiff and Defendants
12 concerning Defendants' obligation to pay to Plaintiff amounts paid by Plaintiff to
13 Defendants for power purchased in energy exchange and multi-day sales transactions,
14 in the Cal ISO and CalPX markets. Defendants deny any such obligation.

15 98. Plaintiff seeks a declaration that, at such time that FERC finds that the
16 rates charged by sellers for such sales were unlawful, Plaintiff will be entitled to
17 recover from Defendants the difference between the rates charged by Defendants for
18 power purchased in energy exchange and multi-day sales and the lawful rates as
19 ultimately determined by FERC for such sales.

20 99. As stated above, Plaintiff has complied with the applicable government
21 claim presentation requirements.

22 100. Plaintiff has filed this Complaint within the applicable statute of
23 limitations or, in the alternative, that statute was tolled and/or equitably tolled during
24 the pendency of the FERC refund and related proceedings, including the pendency of
25 the *Bonneville* case, making this action timely.

26 **EIGHTH CLAIM FOR RELIEF**

27 **(For Declaratory Relief And Contractual And Equitable Indemnification Against**
28 **All Defendants)**

1 101. Plaintiff incorporates by reference and re-alleges each and every
2 allegation of prior paragraphs as if fully set forth herein.

3 102. An actual controversy exists between Plaintiff and Defendants
4 concerning Defendants' obligation to pay to Plaintiff any amount assessed against
5 Plaintiff's Cal ISO and CalPX accounts, as well as for all additional costs incurred by
6 Plaintiff, as a result of Defendants' refusal to honor their repayment obligations.

7 103. Because the Cal ISO and CalPX are revenue-neutral entities, Defendants'
8 refusal to honor their repayment obligations will result in a shortfall of funds needed
9 to settle the accounts of Cal ISO and CalPX participants. Under the terms of the Cal
10 ISO and CalPX Tariffs, other market participants, including Plaintiff, may therefore
11 be required to indemnify Cal ISO and CalPX for the resulting shortfall.

12 104. Any reductions in Plaintiff's account to indemnify Cal ISO and CalPX
13 for Defendants' refusal to honor their repayment obligations will constitute amounts
14 due and owing by Defendants, as ISO Debtors and PX Debtors, to Plaintiff as an ISO
15 and PX Creditor. Plaintiff, as a market participant, is entitled under the Cal ISO and
16 CalPX Tariffs to bring proceedings directly against Defendants to recover the
17 amounts owed.

18 105. Plaintiff seeks a declaration that Defendants will be liable to Plaintiff on
19 grounds of contractual and equitable indemnification for any amount assessed against
20 Plaintiff's account, as well as for all additional costs incurred by Plaintiff, as a result
21 of Defendants' refusal to honor their repayment obligations.

22 106. As stated above, Plaintiff has complied with the applicable government
23 claim presentation requirements.

24 107. Plaintiff has filed this Complaint within the applicable statute of
25 limitations or, in the alternative, that statute was tolled and/or equitably tolled during
26 the pendency of the FERC refund and related proceedings, including the pendency of
27 the *Bonneville* case, making this action timely.
28

NINTH CLAIM FOR RELIEF

(For Declaratory Relief Concerning Cal ISO And CalPX Accounts Against All Defendants)

108. Plaintiff incorporates by reference and re-alleges each and every allegation of prior paragraphs as if fully set forth herein.

109. An actual controversy exists between Plaintiff and Defendants concerning Defendants' obligation to refund to Plaintiff overcharges associated with sales during the Refund Period and Defendants' liability to Plaintiff concerning overcharges for Summer Period sales and non-spot transactions if FERC corrects the prices for those transactions.

110. Plaintiff seeks a declaration that Defendants are contractually obligated to permit their accounts at the Cal ISO and CalPX to be adjusted to reflect all pricing changes resulting from FERC's determination of the corrected, maximum rates under the Cal ISO and CalPX Tariffs and the recalculation by Cal ISO and CalPX, pursuant to FERC's direction, of the prices charged under the Cal ISO and CalPX Tariffs during the relevant time periods, and are contractually obligated to pay any refunds and to otherwise honor the invoices reflecting the refunds associated with such transactions.

111. As stated above, Plaintiff has complied with the applicable government claim presentation requirements.

112. Plaintiff has filed this Complaint within the applicable statute of limitations or, in the alternative, that statute was tolled and/or equitably tolled during the pendency of the FERC refund and related proceedings, including the pendency of the *Bonneville* case, making this action timely.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. On the First Claim for Relief:

For damages according to proof at trial.

2. On the Second Claim for Relief:

For damages according to proof at trial.

3. On the Third Claim for Relief:

a. For restitution according to proof at trial.

b. For constructive trust.

4. On the Fourth Claim for Relief:

a. For damages according to proof at trial.

5. On the Fifth Claim for Relief:

For a declaration that Defendants are obligated to return to Plaintiff amounts charged in excess of the rates set by FERC for the Refund Period.

6. On the Sixth Claim for Relief:

For a declaration that, if FERC finds that the rates charged by sellers during the Summer Period were unlawful, Defendants will be obligated to return to Plaintiff the difference between the rates charged by Defendants and the lawful rates as ultimately determined by FERC for sales of electric energy during the Summer Period.

7. On the Seventh Claim for Relief:

For a declaration that, at such time that FERC finds that the rates charged by sellers for such sales were unlawful, Plaintiff will be entitled to recover from Defendants the difference between the rates charged by Defendants for power purchased in energy exchange and multi-day sales and the lawful rates as ultimately determined by FERC for such sales.

8. On the Eighth Claim for Relief:

For a declaration that Defendants will be liable to Plaintiff on grounds of contractual and equitable indemnification for any amount assessed against Plaintiff's account, as well as for all additional costs incurred by Plaintiff, as a result of Defendants' refusal to honor their repayment obligations.

9. On the Ninth Claim for Relief:

For a declaration that Defendants are contractually obligated to permit their accounts at the Cal ISO and CalPX to be adjusted to reflect all pricing changes resulting from FERC's determination of the corrected, maximum rates under the Cal ISO and CalPX Tariffs and the recalculation by Cal ISO and CalPX, pursuant to FERC's direction, of the prices charged under the Cal ISO and CalPX Tariffs during the relevant time periods, and are contractually obligated to pay any refunds and to otherwise honor the invoices reflecting the refunds associated with such transactions.

10. And, On All Causes of Action:

- a. An award of all costs incurred by Plaintiff herein;
- b. An award of prejudgment interest as authorized by law; and
- c. Such other and further relief as the Court deems just and proper.

DATED: March 21, 2006

HENNIGAN BENNETT & DORMAN LLP
J. Michael Hennigan
Laura Lindgren
Robert W. Mockler

By /s/ Laura Lindgren
Laura Lindgren

Attorneys for Plaintiff
San Diego Gas & Electric Company